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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH C. FRADY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "plain error" standard of Fed. R. Crim. P. 52(b) governs the availability of collateral relief from a criminal conviction that is challenged on the basis of erroneous jury instructions to which no objection was made at trial or on direct appeal.

2. Whether, assuming "cause" must be shown to excuse a defendant collaterally attacking his conviction from the consequences of his failure to make timely objection, that standard is satisfied by the conclusion that objection may have been futile.

3. Whether respondent established sufficient cause for his failure to object to erroneous jury instructions and prejudice as a result of those instructions to warrant setting aside his conviction on collateral attack pursuant to 28 U.S.C. 2255.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-18a) is reported at 636 F.2d 506. The order of the district court (App. D, *infra*, 29a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 19a-20a) was entered on August 4, 1980. A

petition for rehearing with a suggestion for rehearing en banc was denied on October 22, 1980 (App. C, *infra*, 21a-28a). On January 13, 1981, the Chief Justice extended the time in which to petition for a writ of certiorari to and including February 19, 1981. On February 11, 1981, Justice Brennan further extended the time in which to petition for a writ of certiorari to and including March 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND OTHER PROVISIONS INVOLVED

28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

Rule 30 of the Federal Rules of Criminal Procedure provides in relevant part:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *.

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

> *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

1. a. On March 13, 1963, respondent and Richard A. Gordon brutally murdered Thomas Bennett. The victim's "head had been caved in by several blows from a blunt instrument and a mixture of blood and brains was coming from the wounds. * * * One of the victim's eyes had been knocked from its socket and was lying on his cheek when the officers arrived" (*Frady* v. *United States* (*Frady I*), 348 F.2d 84, 100 (D.C. Cir.) (en banc), cert. denied, 382 U.S. 909 (1965)). Respondent and Gordon battered and stomped their victim to death. One of the lethal implements appears to have been a broken piece of a table top. There were horseshoe-shaped marks on the victim's neck and chest that corresponded in size and shape with the metal heel plates on respondent's leather boots; dried blood was found around the heel of respondent's left boot.

Hearing the victim's screams for help during the struggle, which lasted for at least ten minutes, a neighbor called the police. Respondent and his co-defendant were captured as they left the scene of the killing covered with blood. Subsequent investigation revealed that respondent had driven past the victim's house twice earlier on the day of the murder. From this evidence and other testimony at trial "the jury could have concluded that Frady and Gordon twice reconnoitered so they would know Bennett's

house when they returned later in the evening after darkness had completely fallen" (*Frady I*, *supra*, 348 F.2d at 102). Immediately before the murder, respondent and Gordon met with the victim's brother. During the course of their conversation respondent asked the victim's brother about the possibility of killing a man by hitting him in the chest, "could you break a rib and fracture or puncture a lung * * *" (*id.* at 103). As respondent and Gordon prepared to leave, the victim's brother promised them a "bonus" if they did a "good job" (*ibid.*). "[T]he jury could well have concluded that Frady and Gordon were assassins hired by George Bennett to do away with his brother * * *" (*ibid.*).

At trial, the defense was a complete denial of responsibility. Respondent and his co-defendant attacked the credibility of the prosecution witnesses and suggested that another man, the real murderer, had been seen leaving the house of the victim. The question of intent was not in issue; there was no hint of self-defense or any other defense affecting the degree of culpability.

The elements of first-degree murder in the District of Columbia, as pertinent here, require that the killing be done "* * * purposely * * * of deliberate and premeditated malice * * *" (D.C. Code Ann. § 22-2401 (1973)). A finding of malice alone, without deliberation and premeditation, can only support a conviction of second-degree murder (D.C. Code Ann. § 22-2403 (1973)). Absent malice, a culpable homicide is classified as manslaughter. During the course of a lengthy charge to the jury, the trial court said (Tr. 806; emphasis added):

> The instrument or means by which a homicide has been accomplished is always to be taken into consideration in determining whether the act is

> criminal and in what degree it may be so. If in a prosecution for homicide it is shown that the accused used a deadly weapon in the commission of the homicide, *the law infers or presumes from the use of such weapon in the absence of explanatory or mitigating circumstances the existence of the malice essential to culpable homicide.*

The court also stated (*ibid;* emphasis added):

> In determining *whether a wrongful act is intentionally done and is therefore done with malice aforethought,* you should again bear in mind that every man is presumed to intend the natural and probable consequences of his own act. As I have already told you, the intent may be deduced from all the circumstances.[1]

No objection was made to either of these instructions by the defense. The jury found both defendants guilty of first-degree premeditated and deliberate murder and of robbery, but, in accordance with the trial court's instructions regarding the proper verdict in the event of a conviction of premeditated murder, it found the defendants not guilty of felony-murder.

b. On direct appeal, the court of appeals affirmed respondent's conviction of first degree murder, specifically rejecting his claim that the evidence of premeditation and deliberation had been insufficient. *Frady I, supra,* 348 F.2d at 85-86, 99-103 (Miller,

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[1] The italicized portions of the instructions were the basis for the decision of the court of appeals in this case. The court of appeals expressly declined to decide whether this Court's decision in *Sandstrom* v. *Montana,* 442 U.S. 510 (1979), was applicable in this case (App. A, *infra,* 5a-6a n.7).

J.).[2] Just two years after its decision in *Frady I*, the court of appeals observed that it was error to state that " 'the law infers * * * malice' " from the use of a deadly weapon and that a correct statement would be that the law permits the jury to infer malice. *Belton* v. *United States*, 382 F.2d 150, 154 (1967); see *Howard* v. *United States*, 389 F.2d 287, 291 (D.C. Cir. 1967).[3] In *Belton*, the court declined to find "plain error" and affirmed the conviction for first degree murder, saying: "A jury inferring premeditation and deliberation could hardly have failed to infer malice" (382 F.2d at 155).[4] The following year, the court of appeals noted that "[a] wrongful

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[2] The court also affirmed respondent's robbery conviction. For reasons that are immaterial in this case, the court vacated the sentence of death that had been imposed on the murder conviction and remanded the case, directing the trial court to resentence respondent to life imprisonment, "the only sentence other than death that [could] be imposed" under the statute as it existed then. *Frady I*, *supra*, 348 F.2d at 85. In accordance with the instructions of the court of appeals, the trial court resentenced respondent to life imprisonment on the murder conviction. The district court also expressly stated that the sentence on the robbery conviction, which would have become academic had the death sentence been carried out, was to be consecutive to the sentence of life imprisonment.

[3] In *Belton* the court attributed the trial court's misstatement to inadvertence, stating:

> We have little doubt that if objection had been made this slip of the tongue by a capable trial judge—assuming the reporter heard him right—would have been corrected.

382 F.2d at 154.

[4] In *Howard* the court also declined to find "plain error" requiring reversal. 389 F.2d at 291.

act intentionally done is not therefore done with malice" (*Green* v. *United States* (*Green I*), 405 F.2d 1368, 1370 (D.C. Cir. 1968) and, accordingly, held that it was error to equate the two concepts by using the phrase " 'whether a wrongful act is intentionally done and, therefore, is done with malice' " in jury instructions (*ibid.*). See *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *Sims* v. *United States*, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968). As in *Belton*, the court attributed the district court judge's misstatement to "inadverten[ce]" (*Green I*, *supra*, 405 F.2d at 1370) rather than to any lack of clarity in the law.[5]

c. After filing at least six meritless motions to have his sentence reduced, modified, or vacated (including one alleging ineffective assistance of counsel), respondent moved to vacate his sentence on the robbery conviction because the murder and robbery arose out of the same transaction (App. A, *infra*, 2a-3a n.2). The motion was denied; the court of appeals denied leave to appeal in forma pauperis, concluding that there was no merit in the claim. *United States* v. *Frady* (*Frady II*), 607 F.2d 383, 385 (D.C. Cir. 1979). Respondent modified his claim in a motion for reconsideration, arguing that the consecutive sentence on the robbery conviction violated the Double Jeopardy Clause. Since the robbery sentence was originally "concurrent with the sentence of death for the murder" (*id.* at 386), respondent had already begun to serve the sentence when the court of appeals vacated the death sentence and remanded for resentencing (*id.* at 386-387).

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[5] Neither *Belton*, *Howard*, *Green*, nor *Wharton* purports to rest on constitutional grounds or to overrule any prior decision.

Therefore, the court of appeals concluded, "alteration" of the robbery sentence by making it consecutive to the sentence for murder violated the Fifth Amendment. The court of appeals directed the district court to enter an order making the robbery sentence concurrent with the life sentence on the murder conviction. 607 F.2d at 387.

2. Less than three weeks after the decision in *Frady II* was announced, respondent collaterally attacked his murder conviction pursuant to 28 U.S.C. 2255. For the first time (see App. A, *infra*, 3a n.3), respondent claimed that the erroneous jury instructions given in his case warranted vacation of his murder conviction. The district court denied the motion on the ground that respondent either had or "could have" raised these claims on direct appeal from his 1963 conviction or in one of his previous motions for relief under 28 U.S.C. 2255 (App. D, *infra*, 29a). The court of appeals reversed (App. A, *infra*, 1a-18a).

Relying on *Davis* v. *United States*, 411 U.S. 233 (1973), the court of appeals reasoned that "plain error" (Fed. R. Crim. P. 52(b)) in jury instructions could be noticed on direct appeal notwithstanding a failure to object at trial as required by Fed. R. Crim. P. 30, and therefore "plain error" could also be noticed on collateral attack (App. A, *infra*, 6a-8a).[6] Respondent's failure to object at trial consequently did not bar consideration of the claim on collateral attack. The instructions were clearly wrong in light of *Belton*, *Howard*, *Green*, and *Whar-*

[6] Since the instructional errors in this case stated "colorable" constitutional claims, they were deemed to be cognizable in a Section 2255 proceeding without regard to their probable significance at trial. Compare *Davis* v. *United States*, 417 U.S. 333, 345-346 (1974).

ton (App. A, *infra*, 5a) and, in the court's view, "the evidence of malice was equivocal" (*id.* at 11a). Since the erroneous instructions "may well have precluded the reasonable juror from considering manslaughter as a possible verdict" (*ibid.*), the court found that the plain error standard had been satisfied.

The court also held that if the "cause" and "actual prejudice" standard of *Davis*, *supra*, were applicable, it too was satisfied (App. A, *infra*, 14a-15a n.17). Since the erroneous instructions "were standard" (*ibid.*) at the time of respondent's trial, respondent's "counsel had every right to assume that any objection to the instructions would have been futile" (*id.* at 13a). In the court's view, the perceived futility of objection was sufficient "cause" under *Davis* to excuse the failure to object. The showing of "actual prejudice" required by *Davis* was established, according to the court of appeals, because the evidence of malice was "equivocal" and the instructions may have precluded the jury from returning a manslaughter verdict.[7]

The court denied the government's petition for rehearing en banc, four judges dissenting (App. C, *infra*, 21a-28a). In the dissenters' view, the panel (*id.* at 28),

> [u]sing the standard of direct appeal instead of collateral review; ignoring the *en banc* decision * * * on direct appeal; mischaracterizing

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[7] The court of appeals simply ignored the district court's conclusion (App. D, *infra*, 29a) that respondent was not entitled to relief because he could have raised his present contentions in his prior motions for relief under 28 U.S.C. 2255. See *Sanders* v. *United States*, 373 U.S. 1, 17-18 (1963).

> evidence this court had found to be clear, convincing and sufficient; * * * misinterpreting and misapplying recent Supreme Court cases * * * has managed to free at last a brutal contract killer originally thought worthy of the death penalty.

REASONS FOR GRANTING THE PETITION

In sustaining respondent's claim for relief in this case, the court of appeals has not only released "a brutal contract killer" (App. C, *infra*, 28a), but also ignored the decisions of this Court and radically expanded the scope of review available on collateral attack. While this case involves jury instructions concerning malice in a murder prosecution, the reasoning of the court of appeals would be no less applicable in any case involving a significant error in jury instructions or an erroneous evidentiary ruling. If, as the court of appeals held, the failure to object to erroneous jury instructions or to raise the point on appeal may be overlooked solely on the ground that objection might have been "assumed" to be futile, or if the erroneous instruction may simply be reviewed under the plain error standard of Fed. R. Crim. P. 52(b), every change or clarification in the law concerning such matters will prompt a new round of collateral attacks.[8] "Appeals" under 28 U.S.C. 2255 will be "interminable" (*Sunal* v. *Large*, 332 U.S. 174, 182 (1947)).

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[8] The analysis employed by the court of appeals in this case seems to require that any such decision be given completely retroactive effect (see App. A, *infra*, 15a-17a).

Furthermore, if the ephemeral showing of "prejudice" made in this case is sufficient to satisfy the "actual prejudice" standard of *Davis* v. *United States*, 411 U.S. 233 (1973), or the requirements of Rule 52(b), collateral attack is little different from review on direct appeal where the claim has been preserved, and no showing of significant prejudice is required.

Finally, if the court of appeals is correct that the defective instruction on malice given at respondent's trial was a standard one,[9] the practical effect of its decision in the instant case is that virtually all murder convictions obtained in the District of Columbia prior to the decision in *Belton* v. *United States*, 382 F.2d 150 (D.C. Cir. 1967), in cases involving the use of a weapon, are subject to successful collateral attack.

1. The court of appeals concluded in this case that the discretion afforded courts pursuant to Fed. R. Crim. P. 52(b) to notice and correct "[p]lain errors or defects affecting substantial rights * * *" provides the appropriate "standard of review" in considering collateral attacks upon final convictions pursuant to Section 2255 (App. A, *infra*, 8a). This holding is inconsistent with the "cause and prejudice" standard evolved by this Court (see *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, *supra*) for determining the circumstances in which a defendant collaterally attacking his conviction will be excused from the consequences of a procedural de-

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[9] We note that there is reason to doubt the accuracy of the assertion that this was a "standard" instruction at the time of respondent's trial. See note 14, *infra*.

fault. It has the effect of obliterating the distinction between direct and collateral review of criminal convictions, thereby dramatically increasing the susceptibility of otherwise final judgments in criminal cases to collateral attack. The striking ramifications of this holding for the administration of criminal justice call for review by this Court.

The issue in the present case is whether respondent should be permitted to attack his conviction on the basis of concededly erroneous jury instructions that he neither objected to at trial nor challenged on appeal. Under the "cause and prejudice" standard employed by this Court in cases of procedural default, no relief can be granted in a collateral attack proceeding unless the movant demonstrates that there was some substantial reason justifying his failure to raise the particular claim in a timely fashion. The inquiry is appropriately focused upon the "cause" alleged to excuse the failure to comply with the procedural rule—here Fed. R. Crim. P. 30, which requires contemporaneous objection to portions of jury instructions deemed erroneous—and its sufficiency in light of the purposes the procedural rule was designed to serve.[10]

The "plain error" standard of Rule 52(b), on the other hand, is ill-suited to the context of collateral attack and was, we submit, never designed or in-

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[10] The movant's burden to demonstrate "cause" for excusing the failure to make timely objection during the course of a trial is particularly great because timely objection might prevent the error altogether. See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88-89; *Henderson* v. *Kibbe*, 431 U.S. 145, 157-158 (1977) (Burger, C.J., concurring); *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring).

tended for use in that context. Rather, it was designed to allow courts, in the context of trial and direct appeal, to recognize and correct obvious errors notwithstanding counsel's failure to make appropriate objection or seek appellate review of the claim. It confers broad discretion to correct errors overlooked by counsel essentially without regard to the existence of any excuse or justification for counsel's dereliction.[11] The court of appeals' adoption of "plain error" as the standard of review thus effectively nullifies the "cause" portion of the "cause and prejudice" standard evolved by this Court.[12]

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[11] Even on direct appeal, we believe there are limits on the power of the court to excuse a procedural default under the "plain error" provision of Rule 52(b). For example, we believe the power would not reach waivers resulting from failure of timely compliance with Rule 12, since that rule contains its own directive regulating relief from such waivers, and specifically requires a showing of "cause." Fed. R. Crim. P. 12(f).

It is also arguable that Rule 30, which provides unequivocally that "[n]o party may assign as error any portion of the charge * * * unless he objects thereto before the jury retires to consider its verdict * * *," bars application of plain error principles to improper jury instructions. Most courts, however, have concluded that "plain error" in jury instructions may be noticed on direct appeal. See, *e.g.*, *United States* v. *Spiegel*, 604 F.2d 961 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980); *Government of the Virgin Islands* v. *Navarro*, 513 F.2d 11 (3d Cir.), cert. denied, 422 U.S. 1045 (1975); see also *Namet* v. *United States*, 373 U.S. 179, 190-191 (1963). We accept for present purposes the soundness of those decisions, but we believe it is entirely unwarranted to extend them to the context of collateral attacks.

[12] There is something especially incongruous about applying the doctrine of plain error in a collateral attack by a federal prisoner such as respondent, who has already had his

In the process of obliterating any meaningful distinction between direct appeal and collateral attack, the court of appeals nowhere acknowledged the repeated admonitions of this Court that there are fundamental differences between these two remedies. As the Court recently emphasized in *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979):

> When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment. The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.

The Court went on to explain (*id.* at 184-185 n.11):

> Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. * * * Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful. See *Stone* v.

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conviction painstakingly reviewed by an en banc court of appeals, to which the error in question either was not "plain" or was not deemed sufficiently substantial to warrant discussion in its thorough opinions, let alone reversal of the conviction.

Powell, 428 U.S. 465, 491 n.31; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13.

See also *Sumner* v. *Mata*, No. 79-1601 (Jan. 21, 1981), slip op. 11 n.3.

The distinction has been specifically noted by this Court in the context of collateral attacks based upon erroneous jury instructions. "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). While this statement was made in the context of review of a state judgment, with its attendant constitutional constraints, the views it reflects seem to us fully appropriate in the federal context, where, indeed, the defendant will already have enjoyed review as a matter of right in a federal appellate court.

In sum, this Court's decisions in *Davis*, *Wainwright*, and *Francis* require the conclusion that Rule 52(b) is inapposite in this context.[13] By applying the "plain error" standard of Rule 52(b), the court of appeals has either ignored or rendered meaningless the standard for review in Section 2255 proceedings established in *Davis*. "So far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal* v. *Large*, *supra*,

[13] Indeed, the majority in *Davis* implicitly rejected Justice Marshall's suggestion (411 U.S. at 252) that the "cause and prejudice" standard was inappropriate on collateral attack because similar procedural defaults could be noticed under Rule 52(b) on direct appeal without such a showing.

332 U.S. at 178; accord, *Stone* v. *Powell*, 428 U.S. 465, 477 n.10 (1976). The "cause" and "actual prejudice" standard is responsive to the concerns underlying this general rule; Fed. R. Crim. P. 52(b) is not.

2. The court of appeals attempted to bolster its untenable conclusion that respondent's failure to object to the instructions at trial does not bar relief under Section 2255, by finding alternatively that the "cause and prejudice" standard was satisfied here. According to the court of appeals, at the time of respondent's trial the two erroneous instructions were "standard" (App. A, *infra*, 13a) and, therefore, respondent's "counsel had every right to assume that any objection to the instructions would have been futile" (*ibid.*).[14]

The court of appeals' holding that the assumed futility of objection is sufficient "cause" to justify overlooking the procedural default conflicts with decisions in both the Fourth Circuit and the Second Circuit. *Cole* v. *Stevenson*, 620 F.2d 1055, 1063 (4th Cir. 1980) (en banc) (Section 2254 proceeding); *Indiviglio* v. *United States*, 612 F.2d 624, 631 (2d Cir. 1979), cert. denied, 445 U.S. 933 (1980) (Section 2255 proceeding; judgment that suppression motion would have been unsuccessful is insufficient "cause"

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[14] Although the instructions may have been "standard" in 1963, our research has revealed no case in which they were approved, and the court of appeals cited none. Furthermore, in both *Belton* and *Green I* (the two cases in which the instructions were first disapproved), the courts seemed to regard the law on the point as clear. In both cases, the courts attributed the erroneous instructions to inadvertence on the part of the trial court. See 382 F.2d at 154; 405 F.2d at 1370.

under Fed. R. Crim. P. 12).[15] Cf. *Sunal* v. *Large*, *supra*, 332 U.S. at 181 ("since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile"); see also *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952). The Sixth Circuit and, perhaps, the Fifth Circuit seem to agree with the court below that the assumed "futility" of objection is sufficient "cause" for failure to make timely objection. See *Isaac* v. *Engle*, No. 78-3488 (6th Cir. Dec. 12, 1980), slip op. 6-7 (Brown, J.), 15 (Jones, J.) (en banc), petition for cert. pending, No. 80-1430 (filed Feb. 23, 1981) (Section 2254 proceeding); *Tyler* v. *Phelps*, 622 F.2d 172 (5th Cir. 1980) (Section 2254 proceeding; counsel's ignorance or misunderstanding of the law is sufficient "cause").

This Court has left "open for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard * * *" (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 87).[16] The conflict in the circuits

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[15] See also *Polizzi* v. *United States*, 550 F.2d 1133, 1138-1139 (9th Cir. 1976) (Section 2255 proceeding; good faith ignorance is insufficient "cause"); *Dumont* v. *Estelle*, 513 F.2d 793, 798 (5th Cir. 1975) (Section 2254 proceeding; "the mere unencouraging status of the law at the time of trial is not *of itself* 'cause' under *Davis*").

[16] Although not in the context of defining "cause," this Court has made it plain that legitimate procedural rules requiring timely objections to jury instructions may be enforced on collateral attack even if the instructions were standard and objections deemed futile:

> If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objec-

as to whether the assumed "futility" of objection is sufficient "cause" under *Davis* to justify relieving the movant of the obligation to make timely objection should be resolved by this Court, thereby adding content to the "cause" standard.

The position taken by the Fourth and Second Circuits is more consistent with the goals served by the "cause" and "prejudice" standard and contemporaneous objection rules generally than that taken by the court of appeals in this case. If the failure to raise objections to jury instructions will be excused on collateral attack because objection was thought futile, the defendant has little incentive to raise the challenge in timely fashion. Rather, he will make those arguments deemed important to his defense and then await helpful developments in the law. Arguments that were thought to be of marginal significance at trial will be transformed into major elements of the defense in later collateral "appeals." Even if he is unsuccessful in persuading a court that the new development has any bearing on his case, there is nevertheless the possibility that another court will be persuaded in another "appeal." Far from being the "main event," the initial trial will be relegated to the position of a "tryout on the road." See *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 90.

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tions to jury instructions incorporating those presumptions. . . . The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. *See, e.g., Fed. Rule Crim. Proc. 30.*

Hankerson v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977).

Contemporaneous objection rules are intended to encourage the defendant to make all of the claims deemed important to his defense during the trial proceeding. It is then that they can be best evaluated (*Wainwright* v. *Sykes*, *supra*, 433 U.S. at 88-89) and errors corrected, if necessary. It is absolutely senseless to require either state governments or the federal government to litigate every arguable error in every criminal trial that is revealed or suggested by every subsequent clarification or change in the law.

Respondent has not shown any substantial "cause" for his failure to object to the instructions challenged in this case. Even if the erroneous instructions were "standard," he certainly knew that malice was an element of the offense charged. Malice was well defined even in 1963; it was as clear then as it is now that malice is not the equivalent of intent and that it was for the jury to determine whether the killing was done with malice. Indeed, that the court instructed the jury on this element certainly suggests that everyone recognized that the jury was to determine the existence of malice. If the absence of malice had been significant to his defense, it can fairly be assumed that objection would have been made. See also note 3, *supra*. It appears, then, that the only "cause" for failure to object to the instructions shown by respondent in this case is that the absence of malice was not part of his chosen defense strategy.

3. Appraised realistically, it seems plain beyond all serious dispute that respondent suffered no prejudice, "actual" or otherwise, because of the erroneous jury instructions given during his trial. First, it is established that, even on direct appeal, reversal of a conviction is not to be predicated on isolated errors in jury instructions, in the absence of a realistic likeli-

hood, viewing the trial as a whole, that they infected the verdict. *United States* v. *Park*, 421 U.S. 658, 674 (1975). See also *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973); *Henderson* v. *Kibbe*, *supra*.[17]

Second, respondent does not challenge the instructions concerning premeditation and deliberation. Because of the viciousness of the crime and the evidence that this was a "contract killing," it is "inconceivable that the jury that found [respondent] guilty of deliberate and premeditated murder would have failed to find malice * * *." *United States* v. *Green*, 424 F.2d 912, 913 (D.C. Cir. 1970), cert. denied, 400 U.S. 997 (1971).[18] Neither the court of appeals nor

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[17] In the context of the instant case, it is highly unlikely that the brief erroneous portions of the lengthy charge to the jury had any impact at all. "To a lawyer, there is an undeniable gulf between 'the law infers' and 'the law permits you to infer'" (*Belton* v. *United States*, *supra*, 382 F.2d at 154). To the ordinary juror, however, that "gulf" is likely to be perceived as a very thin line, particularly when, as in this case, the court also explained that malice was an element of the offense and that the jury had to find that the government had proved every element of the offense beyond a reasonable doubt. See *id.* at 154-155. The second erroneous instruction, equating intent with malice, was not part of the instruction defining malice, but was given in the context of describing intent. Even if it be assumed that the jurors heard and appreciated the significance of the phrase "and is therefore done with malice," it seems unlikely that they would have understood the judge to be directing them to find malice if they found intent.

[18] Although the sentence of death was set aside on direct appeal, the jury's conclusion that respondent deserved to die for his crime is eloquent testimony that it surely would have found malice even if the court had said you "may infer malice" and had not used the unfortunate phrase "and is therefore done with malice." As the dissenters noted, the verdict indicated that the jurors found "malice aplenty" (App. C, *infra*, 28a).

respondent has suggested any plausible basis for concluding that any jury that found a murder to have been premeditated and deliberate could possibly have concluded that it nevertheless was not done with malice.

Third, the evidence of malice was little short of overwhelming. Respondent and his colleague had been hired by the victim's brother and promised a "bonus" if they did a "good job." Respondent and his colleague bludgeoned and stomped their victim for at least 10 minutes, eventually crushing his skull. Compare, *e.g.*, *Howard* v. *United States*, *supra*, 389 F.2d at 290. If there was any justification for this senseless murder other than the "bonus" promised by the man who hired them, respondent failed to make it known.[19]

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[19] According to the court of appeals, the evidence of malice was "equivocal" (App. A, *infra*, 11a, 13a). As the dissenting judges pointed out, however, the "evidence which [the court of appeals] sitting *en banc* found sufficient to support a verdict of first-degree murder simply cannot fairly be described as 'equivocal'" (App. C, *infra*, 27a). Furthermore, the two factors cited by the court in support of its characterization of the evidence (App. A, *infra*, 11a-12a & n.13) are wholly inadequate. The jury acquitted respondent and his colleague of felony-murder in accordance with the trial judge's instructions (Tr. 803, 819; see App. C, *infra*, 28a) that they could not convict for both premeditated murder and felony-murder. Further, as the dissenters observed, "[t]he verdict reflected the jury's belief that Frady entered the house intending not to rob, but to kill * * *" (App. C, *infra*, 28a). The second factor relied on by the court of appeals (viz., that respondent battered the man to death with a "weapon of chance" (App. A, *infra*, 12)) is strained and unpersuasive, at best. That the killers decided to kill their victim by bludgeoning him with whatever was available in the house, knowing that there would surely be something suitable for the task, provides no basis for concluding that the murder was not premeditated, deliberate, willful, wrongful, intentional, and without justification or excuse.

Fourth, respondent's defense at trial was that someone else had committed the murder. There was no claim of self-defense, passion, accident, or anything else suggesting the absence of "malice" or even relevant to his degree of culpability.

The court of appeals has, 16 years after the trial, set aside a murder conviction because of erroneous jury instructions even though (1) no objection was raised to the instructions at trial (Fed. R. Crim. P. 30); (2) the instructions were not challenged on direct appeal (*Sunal* v. *Large*, *supra*); (3) the instructions were not challenged in any of respondent's prior motions for relief under Section 2255 (*Sanders* v. *United States*, *supra*); (4) respondent has shown no "cause" sufficient to excuse the failure to make timely objection (*Davis* v. *United States*, *supra*); and (5) the instructions were wholly immaterial to his defense (*Wainwright* v. *Sykes*, *supra*). Because of the significant implications of this decision for the administration of criminal justice in the federal courts, review by this Court is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2356

UNITED STATES, APPELLEE

v.

JOSEPH C. FRADY, APPELLANT

Appeal from the United States District Court for the District of Columbia

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(D.C. Criminal No. 402-63)

Argued June 13, 1980

Decided August 4, 1980

Before McGOWAN and EDWARDS, *Circuit Judges*, and FRIEDMAN,* *Chief Judge*, United States Court of Claims.

Opinion for the court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge:* This case is an appeal from the trial court's denial of the appellant's motion under 28 U.S.C. § 2255 (1976) to overturn his

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* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

murder conviction on the ground that the jury instructions on malice and specific intent were defective. Since we find that at least two of the instructions were in error, substantially affecting the fact-finding process and possibly precluding the jury from considering a manslaughter verdict, we reverse and remand for further proceedings. However, because retrial after so many years may be difficult for either the Government or the appellant, if the Government consents, and the trial court considers it to be in the interest of justice after hearing from both parties, the trial judge may enter a judgment of manslaughter. *See United States* v. *Wharton*, 433 F.2d 451, 461 (D.C. Cir. 1970).

I. Background

Appellant, Joseph Frady, and a co-defendant, who is not a party to this appeal, were indicted in 1963 by a federal grand jury for first degree murder, felony murder, and robbery. After a jury trial, they were convicted of first degree murder and robbery; however, both defendants were acquitted of felony murder. The court subsequently affirmed the appellant's conviction.[1] In the years that followed, the appellant filed numerous motions *pro se* to reduce his sentence.[2]

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[1] The court, however, overturned the death sentence and imposed a life sentence in its place. *See Frady* v. *United States*, 348 F.2d 84 (D.C. Cir.) (*en banc*), *cert. denied*, 382 U.S. 909 (1965).

[2] In 1965 the appellant filed four motions to vacate or reduce his sentence. The trial judge denied each of these motions. In 1974 the trial judge denied another motion to modify the sentence. In 1975 the appellant sought to set aside his conviction under 28 U.S.C. § 2255, alleging in-

In September 1979, the appellant filed a motion under 28 U.S.C. § 2255 (1976) alleging that a jury instructions given at the original trial in 1963 were defective and thus denied him a fair trial. The trial judge denied the motion on the grounds that the appellant could have or did raise the issues in his direct appeal or in the various motions filed following his conviction.[3] Since we find that there was plain error in the jury instructions given at appellant's trial, and since we find that the erroneous instructions clearly prejudiced appellant's right to a fair trial, we hereby reverse and remand.

II. The Jury Instructions

The trial judge instructed the jury on each of the elements of first degree murder, second degree murder, and manslaughter. The elements of first degree murder include malice, specific intent, and premeditation; second degree murder is a killing done with malice but without premediation; manslaughter includes all other unlawful killings done without mal-

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effective assistance of counsel. The trial court denied the motion and the appellant did not appeal the judgment. In 1976 the court denied another motion to reduce the sentence. In 1978 the appellant moved to vacate an illegal sentence. This court held that consecutive sentences for robbery and murder, in the context of this case, violated the ban on double jeopardy, and changed the sentences to run concurrently. *United States* v. *Frady*, 607 F.2d 383 (D.C. Cir. 1979).

[3] As a preliminary matter, we note that there is absolutely no evidence in the record to support the finding of the trial judge that Frady raised the issue of erroneous jury instructions in any motions or appeals after his conviction.

ice.[4] Thus, malice is the element that distinguishes both degrees of murder from manslaughter.

The appellant claims that the jury instructions on malice were erroneous in two respects.[5] First, the trial judge equated specific intent with malice.[6] The effect of this instruction, according to the appellant, "was to take the case out of the category of manslaughter and place it in the category of murder." *Green* v. *United States* (*Green I*), 405 F.2d 1368, 1370 (D.C. Cir. 1968). *See United States* v. *Perkins*, 498 F.2d 1054, 1058 (D.C. Cir. 1974) (condemning the same instruction). Second, the trial judge instructed the jury that "*the law infers or presumes from the use of such weapon* in the absence of explanatory or mitigating circumstances *the existence of the malice* essential to culpable homicide" (Tr. at 806) (emphasis added). Appellant argues that this

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[4] In 1963, at the time when appellant was indicted, the D.C. Code defined first degree murder as a killing done "purposely, either of deliberate and premeditated malice or" during the commission of a felony. D.C. Code Ann. § 22-2401 (1973). The jury, however, acquitted Frady of felony murder.

The Code defined second degree murder as a killing, excluding first degree murder, done with "malice aforethought." D.C. Code Ann. § 22-2403 (1973). Manslaughter is "the unlawful killing of a human being *without malice*." *Fryer* v. *United States*, 207 F.2d 134, 138 (D.C. Cir.), *cert. denied*, 346 U.S. 885 (1953) (emphasis in original). *See United States* v. *Wharton*, 433 F.2d 451, 454 (D.C. Cir. 1970) (malice is "the sole element differentiating murder from manslaughter").

[5] The Government does not dispute the contention that the jury instructions were erroneous.

[6] In his instructions to the jury, the trial judge stated:

> In determining whether a wrongful act is intentionally done *and is therefore done with malice aforethought* . . . .

Trial Transcript ("Tr.") at 806. (emphasis added).

instruction, compelling the jury to presume malice, also prevented the jury from considering a verdict of manslaughter.

Beyond question, each of the cited instructions is erroneous. They are identical to the instructions given in *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970), and *Green* v. *United States* (*Green I*), 405 F.2d 1368 (D.C. Cir. 1968), where this court found the use of the instructions to be reversible error.[7]

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[7] Apart from the two plainly erroneous instructions, the parties disagree as to whether a third instruction, dealing with specific intent, was also so erroneous and prejudicial as to require reversal of the appellant's conviction. On this point, the trial judge instructed the jury that

> A person is presumed to intend the natural [and] probable consequences of his act.

(Tr. at 804). The trial judge subsequently repeated this instruction (Tr. at 806). The appellant contends that under the holding in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), this instruction, given twice in this case, violated the Fourteenth Amendment.

In *Sandstrom*, the Supreme Court held unanimously that a similar instruction—"[t]he law presumes that a person intends the ordinary consequences of his voluntary acts"—may lead the reasonable juror to conclude that the presumption is conclusive. Even if it were rebuttable, the presumption would impermissibly shift the burden of proof to the defendant. 442 U.S. at 515, citing *Wharton* and *Green I*.

In *Sandstrom*, the Court also noted that the jurors "were not told . . . that they might infer" specific intent. 442 U.S. at 515. In the present case, however, the judge instructed the jury that "you are not compelled to presume that he intended to kill from such acts but have the right to consider them in reaching a determination of his intent" (Tr. at 804). At another point, the trial judge said "the intent may be deduced from all the circumstances" (Tr. at 806). Thus, while a portion of the instructions on specific intent were clearly

III. Standard of Review

Because the appellant did not object at trial to the jury instructions here in question, we must first decide whether the errors in the instructions are of such magnitude that we can overlook what the Government claims to be his procedural default. At the outset, we note that this action is brought by a federal prisoner. Thus, problems of comity and federalism do not come into play in this matter.

Davis v. *United States*, 411 U.S. 233 (1973), is the leading case dealing with the availability of collateral relief for federal prisoners who fail to raise objections at trial. Repudiating some of the broad language in *Fay* v. *Noia*, 372 U.S. 391 (1963), the Court in *Davis* held that a federal prisoner, challenging the racial composition of the grand jury that indicted him, must show *cause* for his failure to make a timely objection as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure.[8] This cause requirement is based on Rule 12(f), which provides that failure to raise objections "shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." The Supreme Court held that, absent cause, Rule 12(b) precludes untimely

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erroneous, they may have been sufficiently qualified by subsequent instructions to be free from taint. *See United States* v. *Green* (*Green II*), 424 F.2d 912, 913 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 997 (1971); *Belton* v. *United States*, 382 F.2d 150, 154 (D.C. Cir. 1967). Because of our disposition of this case, however, we need not decide this issue.

[8] Rule 12(b)(2) provides in part:

> The following must be raised prior to trial:
>
> . . .
>
> (2) Defenses and objections based on defects in the indictment or information.

challenges to grand jury arrays, even when such challenges are on constitutional grounds. 411 U.S. at 242.

The Court in *Davis* also held that both "the reasons for the Rule and the normal rules of statutory construction" require at least as strict a standard for collateral attacks as for direct appeals. *Id.* at 240-41. Thus, the Court concluded that to allow a less stringent standard for collateral attacks would "perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings." *Id.* at 242.

Following the analysis set forth in *Davis*, we turn to Rule 30 of the Federal Rules of Criminal Procedure, which provides that

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict.

Although it does not refer to *waiver specifically*, the general thrust of Rule 30 is to foreclose the appellant from raising objections to jury instructions on appeal unless the appellant objected to the instructions at trial.

Rule 30, however, must be read in conjunction with Rule 52(b), which provides that

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Under Rule 52(b), it is clear that an appellant is not automatically barred from objecting to jury instructions on appeal where no objection has been raised at trial. Indeed, it has been consistently held in this circuit that, even though no objection was raised at trial, appellants may raise certain errors on direct

appeal. *See United States* v. *McClain*, 440 F.2d 241, 245 (D.C. Cir. 1971); *United States* v. *Williams*, 463 F.2d 958, 962 (D.C. Cir. 1972); *United States* v. *Alston*, 551 F.2d 315, 320-21 (D.C. Cir. 1976). We follow this line of authority in our consideration of this case.

Since, as the *Davis* court held, the standard for allowing a 28 U.S.C. § 2255 motion on an issue not raised at trial should be no less stringent than the standard in the Federal Rules of Criminal Procedure for review on direct appeal, we hold that the appropriate standard for review in this case is the *plain error* standard set forth in Rule 52(b).[9]

The Government also briefly argues that the trial court may dismiss a motion filed under section 2255 if the Government has been prejudiced in its ability to respond to the motion. Rule 9(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts. First, we note that the District Court did not dismiss the appellant's petition for this reason. Second, we do not find that the Government is prejudiced in *responding to the motion*. On the contrary, since no evidentiary hearing is required to decide appellant's case, the Government is quite able to respond to the motion.

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[9] Other circuits have used the plain error standard in reviewing 28 U.S.C. § 2255 motions attacking convictions based on faulty jury instructions. For example, in *Tallman* v. *United States*, 465 F.2d 282, 287 (7th Cir. 1972), the court held that it would allow collateral relief for erroneous jury instructions only if "the effect of a plain error was a miscarriage of justice."

Although we conclude that the result in this case would be the same under the "cause and prejudice" standard set forth in *Davis*, we believe that under the rationale of *Davis* the "plain error" standard is the appropriate standard for review in this case. *See* note 17, *infra*.

Third, Rule 9 also provides that the court cannot dismiss the motion if the "movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred." Even if the Government were prejudiced, the appellant, who has been incarcerated and without counsel since his conviction, was in no position to keep up with the changes in the law on the constitutionality of jury instructions. Thus we find that the trial court could not have dismissed the petition under Rule 9.

IV. Plain Error and the Malice Instructions

In several cases, this court has applied the plain error standard to appeals from convictions based on erroneous malice instructions. In *Belton* v. *United States*, 382 F.2d 150 (D.C. Cir. 1967), the trial court had instructed the jury that the law inferred malice from the use of a deadly weapon.[10] This court found no plain error and affirmed the conviction because of a conjunction of factors. First, the error involved only a single phrase that, in context, was unlikely to mislead the jury. Second, the court in *Belton* reasoned that the jury's verdict of first degree murder necessarily implied a finding of premeditation and deliberation, which in turn meant that the jury found malice despite the faulty malice instruction. *See also Howard* v. *United States*, 389 F.2d 287, 291 (D.C. Cir. 1967) (affirming a second degree murder conviction, where the jury was given the same erroneous instruction as in *Belton*, on the grounds that

[10] The court in *Belton* did not give the additional erroneous instruction, given in the present case, equating malice with specific intent.

the evidence of malice was strong and the error was partly cured by a subsequent instruction).

The holdings in *Belton* and *Howard* turned on "the over-all factual situations in those cases." *Green* v. *United States* (*Green I*), 405 F.2d 1368, 1369 (D.C. Cir. 1968). In *Green I* the trial court gave *both* of the defective malice instructions that were given in the present case. On appeal, this court reversed the defendant's first degree murder conviction. The reversal in *Green I* was obviously militated by the multiple errors in the instructions given to the jury; in noting these errors, the court observed that

> we cannot know whether the jury were guided by the correct or the incorrect portions of the instructions.

Id. at 1370. In short, the court in *Green I* found that the instructional errors raised substantial doubts that the jury's finding of premeditation necessarily implied malice.

In *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970), this court reversed a second degree murder conviction when the trial judge had given both of the erroneous malice instructions that were given in *Green I* and in the present case.[11] The court in *Wharton* found "plain error" because the trial judge had issued two erroneous instructions and the evidence of malice was equivocal. The court thus concluded that it could not determine whether the jury

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[11] Judge Leventhal, who wrote *Belton*, concurred in *Wharton*. Judge Leventhal also wrote the opinion for the court in *United States* v. *Perkins*, 498 F.2d 1054 (D.C. Cir. 1974), in which the court on direct appeal, reversed a second degree murder conviction predicated on two erroneous malice instructions. Although the opinion is silent on the point, the appellant apparently made the proper objection at trial.

found the defendant guilty of murder despite or because of the faulty instructions. *Id.* at 461.

We conclude that here also the trial judge committed plain error in issuing the two aforecited erroneous malice instructions. This conclusion is reinforced by the decision in *United States* v. *Green* (*Green II*), 424 F.2d 912 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 997 (1971), in which this court affirmed the defendant's conviction after retrial, even though the trial judge had given one of the erroneous malice instructions given in this case. The court expressly distinguished *Green II* from *Green I*, which had two erroneous instructions. *Id.* at 913. *See also Mitchell* v. *United States*, 434 F.2d 483, 488 (D.C. Cir.), *cert. denied*, 400 U.S. 867 (1970) (noting that "the cumulative effect of two erroneous malice instructions" is absent and following the distinction set forth in *Green II*); *Logan* v. *United States*, 441 F.2d 679, 681 n.10 (D.C. Cir. 1968) (distinguishing *Green I* in part because it involved a "combination of errors").

In addition to the case law in this circuit, the facts in this case and the policies underlying Rules 30 and 52(b) support our conclusion that the trial judge committed plain error affecting the appellant's substantial rights. We reiterate that the instructions given by the trial judge may well have precluded the reasonable juror from considering manslaughter as a possible verdict. Were the evidence of malice overwhelming, the error might seem harmless. But here, the evidence of malice was equivocal.[12] Based

[12] *Wharton* requires the appellate court to consider "the probable impact, appraised realistically, of the particular instructional mistakes upon the jury's factfinding function." 433 F.2d at 457.

on the verdict after trial, the jury obviously concluded that the robbery was not part and parcel of the killing.[13] Moreover, the evidence at trial indicated that the appellant did not enter the victim's house armed; he killed the victim with a weapon of chance—a piece of furniture. A manslaughter verdict—a finding that the killing was without malice—would have been consistent with this evidence. Since the trial judge was apparently satisfied that the evidence in the record warranted a jury instruction of manslaughter, it would be anomalous for us to uphold a conviction that may well have resulted from instructions foreclosing the jury from considering the alternative charge of manslaughter.[14]

We reject the Government's contention at oral argument that the erroneous instruction on presuming malice from a weapon was sufficiently qualified by other instructions. In fact, the trial judge told the jury that the weapon "is always to be taken into consideration" (Tr. at 806). This instruction was followed immediately with the trial judge's contested statement that the law presumes malice from the use of a weapon. His instructions did not qualify that presumption.[15]

We also reject the Government's argument that, as in *Belton*, a finding of premeditation implies a

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[13] The jury convicted the appellant of robbery and murder, but acquitted him of felony murder. This certainly suggests that the jury was not convinced that the appellant entered the victim's house with an intention to rob him.

[14] We note that no manslaughter instruction was given in *Belton*. *See* 382 F.2d at 155.

[15] We also follow *Sandstrom*, *supra*, which held that erroneous instructions were not cured by instructions on reasonable doubt and the presumption of innocence. 442 U.S. at 518 n.7.

finding of malice. Because the trial judge in this case compounded his errors by giving more than one plainly erroneous instruction, we are simply unable to tell whether the jury followed the correct or incorrect portion of the instructions. *See Green* v. *United States* (*Green I*), 405 F.2d at 1370.

Under these circumstances, it can hardly be doubted that the appellant was denied a substantial right. Because of the equivocal evidence at trial, and in light of all the instructions, we find the appellant suffered prejudice from the faulty instructions given by the trial judge. *See United States* v. *Pinkney*, 551 F.2d 1241, 1245 (D.C. Cir. 1976) (plain error standard required the appellate court to consider the instructions as a whole and to review the record to see whether the appellant was prejudiced by the instructions). A clear miscarriage of justice has occurred if appellant was guilty of manslaughter but is now serving the penalty for murder. *See Bearden* v. *United States*, 403 F.2d 782, 787 (5th Cir. 1968), *cert. denied*, 393 U.S. 1111 (1969) (holding that Rule 30 does "not bar invocation of Rule 52(b) where instructions have resulted in a miscarriage of justice").

While the purpose of Rule 30 is to allow the trial judge to correct trial errors before the jury retires, *United States* v. *Williams*, 521 F.2d 950, 956 (D.C. Cir. 1975), no legitimate purpose would be served by denying the appellant's 28 U.S.C. § 2255 motion in this case. At the time of his trial, the erroneous instructions were standard. Thus, appellant's counsel had every right to assume that any objection to the instructions would have been futile. To rule otherwise would be to suggest that trial counsel should object to *all* jury instructions in anticipation of

changes in the constitutionality of jury instructions.[16] Such a suggestion borders on the absurd.

We must, therefore, look to Rule 52(b) for guidance in this case. Rule 52(b) is designed to protect the criminal defendant and the integrity of the judicial process. *Herzog* v. *United States*, 235 F.2d 664, 666 (9th Cir.), *cert. denied*, 352 U.S. 844 (1956). The rule is properly invoked whenever an appellant's substantial rights to a fair trial, as here, are threatened. In the instant case, it is axiomatic that the integrity of the judicial proces will suffer if we refuse to review an appellant's claims when he may, in fact, have been convicted of the wrong crime.[17]

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[16] A separate issue here concerns whether the new rule, finding the instructions erroneous, should be applied retroactively. *See* section V, *infra*.

[17] Parenthetically, we address the Government's contention that the proper standard for review in this case is the "cause and prejudice" standard set forth in *Davis*, *supra*. Even assuming that the *Davis* standard applied, we find that Frady has met that standard. This standard bars federal habeas corpus review of constitutional claims absent a showing of cause for noncompliance with the applicable procedural rule—in this case objection at trial to the jury instructions—and some showing of actual prejudice resulting from the alleged constitutional violation. *See also Francis* v. *Henderson*, 425 U.S. 436 (1976) (applying standard to state prisoner), and *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (same).

There was sufficient *cause* for appellant's failure to object at trial to the jury instructions. It was not until four years after his conviction that the challenged malice instructions were found to be erroneous, requiring reversal. It is unrealistic to expect that counsel would have made the futile gesture of objecting to what, at that time, were standard instructions. As noted above, to require counsel to anticipate future constitutional rulings would encourage the mean-

V. Retroactivity

The only remaining issue to be resolved here is whether the rule announced in *Wharton* and *Green I* should be applied retroactively in this case. We hold that it should.

The Supreme Court recently discussed the retroactivity of holdings declaring certain jury instructions violative of due process. In *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), the Court held that its decision in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), condemning instructions that created a presumption of malice, was to be applied to a defendant who had been convicted before the Court decided *Mullaney*.

Quoting previous cases, the Court in *Hankerson* noted that:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the

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ingless task of objecting to every instruction in order to protect the defendant's constitutional rights.

The Government's characterization of counsel's failure to object as a trial tactic is unpersuasive. Competent counsel will object to those instructions that he or she believes might be erroneous, whatever the theory of the case. Moreover, Frady's counsel on direct appeal, who was also the trial attorney, made no attempt to exploit his "mistake."

The appellant was plainly *prejudiced* by the instructions given by the trial judge. As mentioned above, the evidence of record was consistent with a finding of manslaughter. Had the jury been properly instructed on both malice and specific intent, we cannot say whether they would have reached the same result. As in *Wharton* and *Green I* the defendant here has suffered sufficient prejudice to warrant reversal of his conviction.

> accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

Id. at 241.

The *Mullaney* holding, eliminating the presumption of malice, is "designed to diminish the probability that an innocent person would be convicted and thus to overcome an aspect of a criminal trial that 'substantially impairs the truth-finding function.'" *Id.* at 242. The Court emphasized that the key elements of the test for retroactivity are that the error *substantially* impaired the truth-finding process, and that it raised *serious* questions about the accuracy of the guilty verdict. *Id.* at 243.

In *Hankerson*, the Court found that the *Mullaney* holding fit that test, for the instructions issued by the trial judge had shifted the burden of proof to the defendant.[18] The Court found this shift to violate the mandate of *In re Winship*, 397 U.S. 358 (1970), that each element of a crime must be proved beyond a reasonable doubt. Here, too, as the Government conceded at oral argument, the presumption expressed in the malice instructions lightened the Government's burden of proof in its case against appellant. To the reasonable juror, the presumption in the present case may have been no less influential than the rebuttable presumption in *Hankerson*. Given the equivocal nature

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[18] The state law in *Mullaney* presumed malice under certain circumstances, leaving it to the defendant to prove an absence of malice in order to secure a manslaughter rather than a murder conviction. 421 U.S. at 686.

of the proof in the case, and the misleading instructions on malice, we find that the truth-finding function was substantially impaired, raising serious questions about the accuracy of the jury's verdict. Thus, we hold that the rules announced in *Wharton* and *Green I* must be given retroactive application in this case.[19]

The Government may have some concerns about the effect of this holding on the administration of justice. The Court in *Hankerson*, however, was quite clear that "the severe impact on the administration of justice" was not enough to "require prospective application" of the new rule when the other criteria for retroactivity have been met. 432 U.S. at 241, 243. Thus, while we recognize the Government's interest in the outcome of this case, we note that the appellant would be at least as prejudiced by the opposite outcome, for he has been denied the opportunity to be fully and fairly tried for manslaughter as well as murder.

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[19] Footnote 8 in *Hankerson* suggests that the Court's holding on retroactivity will not unduly burden the state courts since most defendants will not have objected to the instructions at trial, thus precluding them from raising the issue on appeal or in habeas corpus proceedings. However, the statement in this footnote is not inconsistent with the decision in this case. First, *Hankerson* involved an appeal from a denial of habeas corpus to a *state* prisoner. Properly, the Court was concerned about issues of comity and federalism that are not present in the instant case. Second, under the Federal Rules of Criminal Procedure, failure to object to jury instructions at trial only changes the standard of review to "plain error." *See* note 9, *supra*. As we have held in this opinion, the jury instructions in this case amounted to plain error.

VI. Conclusion

The District Court's order denying the appellant's motion to vacate the sentence is reversed, and the case remanded to the District Court for a new trial on the first count of the indictment. Because retrial after so many years may be difficult for either the Government or the appellant, if the Government consents, and the trial court considers it to be in the interest of justice after hearing from both parties, the trial judge may enter a judgment of manslaughter. *See United States* v. *Wharton*, 433 F.2d 451, 461 (D.C. Cir. 1970).

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS

September Term, 1979

Criminal No. 402-63

No. 79-2356

UNITED STATES, APPELLEE

v.

JOSEPH C. FRADY, APPELLANT

Filed August 4, 1980

Appeal from the United States District Court for the District of Columbia

Before: McGOWAN and EDWARDS, Circuit Judges, and FRIEDMAN *, Chief Judge United States Court of Claims

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded to the District Court for a new trial on the first count of the indictment, in accord-

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

ance with the opinion of this Court filed herein this date.

For the Court
Per Curiam

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 4, 1980

Opinion for the Court filed by Circuit Judge Edwards

A true copy:
Test: George A. Fisher

United States Court of Appeals
for the District of Columbia Circuit

Atlanta, Ga.

By:
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2356

UNITED STATES OF AMERICA

v.

JOSEPH C. FRADY, APPELLANT

ON SUGGESTION FOR REHEARING EN BANC

(D.C. CRIMINAL NO. 402-63)

Filed October 22, 1980

Before: WRIGHT, *Chief Judge:* MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS AND GINSBURG, *Circuit Judges.*

ORDER

The suggestion for rehearing *en banc* filed by appellee having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellee's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

STATEMENT ON DENIAL OF REHEARING EN BANC

TAMM, MACKINNON, ROBB, and WILKEY, *Circuit Judges*: We would grant a rehearing *en banc* in *United States* v. *Frady* (*Frady* III), No. 79-2356 (D.C. Cir., 4 Aug. 1980), to ascertain whether the standard of judicial review upon collateral attack (under 28 U.S.C. § 2255 (1976)) of a criminal conviction was properly applied by the panel in *Frady* III. The panel set aside a sixteen-year-old conviction for deliberate and premeditated, first-degree murder—a conviction which was affirmed fifteen years ago on direct appeal to this court sitting *en banc*, 348 F.2d 84 (D.C. Cir. 1965) (*en banc*) (one judge dissenting)[1] (*Frady* I), and for which certiorari was denied by the Supreme Court, 382 U.S. 909 (1965).

We submit that finality of criminal convictions where justice has been done is such a basic social interest that all judges must observe scrupulously and responsibly the substantial distinction between standards of direct and collateral review of criminal convictions. We believe it is manifest that a court should not *on collateral review* attack in isolation one aspect of a criminal trial and overturn a jury verdict (for which an appellate court *en banc* found there to be sufficient supporting evidence). A court must "view the [jury] charge itself as part of the whole trial," *United States* v. *Park*, 421 U.S. 658, 674 (1975), to judge whether justice was served or disserved.

The facts in *Frady* are unpleasant: On 13 March 1963 the victim Bennett was unmercifully assaulted

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[1] Chief Judge Bazelon and Judges Miller, Fahy, Washington, Danaher, Bastian, Burger, and McGowan concurred in affirming the first degree conviction. Only Judge Wright dissented.

and murdered in his home. "His head had been caved in by several blows from a blunt instrument and a mixture of blood and brains was coming from the wounds. . . . One of the victim's eyes had been knocked from its socket and was lying on his cheek when the officers arrived." *Frady* I, *supra*, 348 F.2d at 100. This battering, mayhem, and murder needed ten minutes, during which time a neighbor summoned police. They arrived in time to see Frady and codefendant Gordon run from the house and into a waiting car. Frady and Gordon, covered with blood, were arrested shortly thereafter.

On trial this evidence—and other amplifying details as to motive, plan, and preparation—was sufficiently convincing for the jury to return a verdict of guilty on the greatest offense charged—first-degree, premeditated, deliberate murder—and to earn Frady the death penalty, later set aside by a 4-3 vote in *Frady* I, *supra*. The prosecution's evidence proved Frady and Gordon were contract killers; the defense theory, at trial, disclaimed any responsibility or involvement. *The defense made no claim of self-defense or reduced culpability, but, rather, theorized that a third man was in fact the real murderer* and, the defendant did not himself testify, thus waiving any opportunity to give any support whatsoever, then or now, to a defense based on reduced culpability. *See* Brief for Appellee United States of America (*Frady* I, Nos. 18,357 & 18,358) at 10-13; Trial Transcript at 793-99.

Fourteen years after Frady's conviction was affirmed he challenged an instruction to the jury delivered by the trial judge. He predicated the asserted error in that part of the charge where the judge instructed that the law "infers or presumes" the "exist-

ence of the malice essential to culpabable homicide" from the "use of [a deadly] weapon in the absence of explanatory or mitigating circumstances." (Trial Transcript at 806). The trial court instructed the jury also, of course, as to the meanings of premeditation and deliberation, and instructed that these two elements were prerequisite to a conviction for first-degree murder and must be found by the jury beyond any reasonable doubt. The jury handed in a verdict finding premeditation and deliberation—in other words, the jury went *far beyond* the "malice" essential to find a defendant guilty of a murder in any degree and actually found Frady guilty of first-degree premeditated and deliberate murder. This court *en banc* upheld the jury verdict of first-degree murder, holding the evidence legally sufficient to find murder in that degree.

Frady now claims, before the *Frady* III panel, that is, that the jury was denied the chance to reach a reduced culpability verdict, in other words, that a finding of manslaughter in lieu of murder was precluded. We note, as did the *Frady* III panel (slip op. at 4), that the elements of first-degree murder include malice, specific intent, and premeditation; the elements of second-degree murder include malice but no premeditation; while manslaughter encompasses all other unlawful killings done without malice. So "malice" does segregate first- and second-degree murder categories from the category of manslaughter. "Malice" does not, however, distinguish between first- and second-degree murder—the jury reached a verdict of *first, degree murder*, finding *premeditation* and *intent. A verdict of manslaughter is inconceivable, especially when no defense theory turning on self-defense, re-*

duced culpability, or extenuating circumstances was adduced as limiting the responsibility of the defendants. See United States v. *Green* (*Green* II), 424 F.2d 912 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 997 (1971) ("it is inconceivable that the jury that found the appellant guilty of deliberate and premeditated murder would have failed to find malice . . .").

As the *Frady* III opinion outlines, the "malice" instruction was adjudged erroneous in subsequent (*i.e.*, post-*Frady*) decisions of this Circuit. The contention we make here in support of our position to grant the rehearing *en banc* imports absolutely no claim that the jury instruction regarding "malice" in *Frady* should now be deemed the current and proper standard. We only note that the cases (*e.g.*, *United States* v. *Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *Green* v. *United States* (*Green* I), 405 F.2d 1368 (D.C. Cir. 1968)), holding that instruction to be invalid were themselves all on *direct appeal* from guilty verdicts and not upon collateral attacks pressed years and years after trial.

Frady was represented at trial by an attorney. Counsel, in derogation of Fed. R. Crim. P. 30, never raised the issue of erroneous jury charge at trial or on direct appeal. No miscarriage of justice or prejudice to the defendant is apparent under these circumstances, as viewed by the jury finding first-degree murder and this court affirming that verdict. In *Frady* II the erroneous jury charge was considered in isolation from the trial as a whole and from justice in the end. *Frady* III was not an appeal; it was a collateral review whose purpose is to ensure against a fundamental miscarriage of justice and, therefore, should have focused on *all* evidence of guilt and the conduct of the trial as a whole before overturning a conviction, *see Wainwright* v. *Sykes*, 433 U.S. 72,

88-91 (1977); *Cupp* v. *Naughten*, 414 U.S. 141 (1973). The Supreme Court in *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977), laid down the different and enhanced standard of error required to be proved:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment [*see Sunal* v. *Large*, 332 U.S. 174, 178 (1947) (collateral attack will not serve as appeal for *federal* convictions)] is even greater than the showing required to establish plain error in direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," *Cupp* v. *Naughten*, 414 U.S., at 147, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" *id.*, at 146.

Regrettably, the panel in *Frady* III found it necessary to mischaracterize the proof in the record as "equivocal" in order to sustain its extraordinary result. "Equivocal" was not the way the first court and this court *en banc* (*Frady* I) saw it. Judge Miller, with whom joined Judges Bastian, Danaher, and Burger, writing in *Frady* I, stated:

> The court cannot set aside the verdict of the jury unless the evidence was insufficient to sustain it or unless prejudicial error occurred during the progress of the trial. From what has been said, *it is apparent that the evidence amply supported the verdict*; and there is no prejudicial error in the record. The able District Judge conducted the trial in exemplary fashion, and

> charged the jury in a manner which was beyond criticism. *The appellants had no real defense* and there is no real reason shown on appeal why they should not pay that penalty [*i.e.*, capital punishment] for their atrocious crime which the law provides and the jury imposed.

348 F.2d at 111 (emphasis added). On this point we suggest that the panel 15 years later (*Frady* III) is bound by our *en banc* decision and not free to redetermine on this collateral attack what was settled *en banc* on direct appeal. The evidence which this court sitting *en banc* found sufficient to support a verdict of first-degree murder simply cannot fairly be described as "equivocal." Judge McGowan, in *Frady* I, also "share[d] the view that the *convictions of appellants should be affirmed.*" 348 F.2d at 91. Whereas he could not approve the death penalty, this was, Judge McGowan said, "*not because I believe there were errors in the instructions . . . .*" *Id.* (emphasis added).

One other mischaracterization of the record, important to the panel's line of reasoning, must be refuted. The opinion asserts: "Were the evidence of malice overwhelming, the error [in the instructions] might seem harmless. But here the evidence of malice was equivocal. Based on the verdict after trial, the jury obviously concluded that the robbery was not part and parcel of the killing [footnotes omitted]," citing in support of this that the jury acquitted Frady of felony murder. Slip op. at 11.

Nowhere in the opinion does the panel mention that Frady had driven past the victim's house two separate times that day, nor that Frady's co-murderer, Gordon, had picked up a pair of gloves before entering the house, so that "[s]ignificantly,

the murder weapon bore no fingerprints." 348 F.2d at 101 n.3, and 103. And, as anyone familiar with trial instructions might guess, the jury's failure to convict on felony murder was *not* for lack of malice, as the panel implies, *but because the trial judge properly instructed the jury that it could not find the defendants guilty of both felony murder and first-degree premeditated murder* (Trial Transcript at 803). The verdict clearly reflected the jury's belief that Frady entered the house intending not to rob, but to kill, *i.e.*, that there was malice aplenty. There was malice and evidence so overwhelming as originally to justify imposing the death penalty. In light of the evidence it is inconceivable that the trial could have been fatally infected by two short phrases in the court's charge.

Using the standard of direct appeal instead of collateral review; ignoring the *en banc* decision of this court on direct appeal; mischaracterizing evidence this court had found to be clear, convincing and sufficient; misconstruing the jury's acquittal on the felony murder count; misinterpreting and misapplying recent Supreme Court cases on instructions, plain error, and retroactivity to be accorded; this panel of our court has managed to free at last a brutal contract killer originally thought worthy of the death penalty. The rest of the court should awake to what has taken place.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal Number 402-63

UNITED STATES

v.

JOSEPH C. FRADY

Filed Sep. 20, 1979

ORDER

This cause came on the *pro se* motion of petitioner to vacate and set aside his sentence pursuant to 28 U.S. Code § 2255, and it appearing to the Court that the petitioner has previously filed motions for similar relief on July 9, 1965 and on January 3, 1975, and that following trial and conviction petitioner filed an appeal to the United States Court of Appeals for the District of Columbia (*See* Frady v. United States, 121 U.S. App. D.C. 78, 348, F.2d 84 (en banc), *cert. denied*, 382 U.S. 909 (1965)) in which matters raised by this motion were raised or could have been raised, and it further appearing to the Court that the files and records conclusively show that petitioner is entitled to no relief, it is hereby, by this Court, this 20th day of September, 1979,

ORDERED, that the *pro se* motion of petitioner be, and the same hereby is, denied.

/s/ George L. Hart, Jr.
GEORGE L. HART, JR.
United States District Judge

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